not, in our opinion, a relevant consideration. Another argument advanced on behalf of the respondent is that, according to Choor Singh J. no dishonesty on the part of the respondent was involved. In our opinion, dishonesty is not the only defect of character which makes an advocate and solicitor unfit for his profession. Whether or not an advocate and solicitor's conviction of a criminal offence implies a defect of character which makes him unfit for his profession depends on the facts and circumstances of that particular case and the nature of that criminal offence. For these reasons we reject this submission.

We come now to the question of sentence. It is submitted on behalf of the respondent that his misconduct is substantially the same as his misconduct on the delay charge for which he has been punished by two years' suspension from practice and it would not be right to inflict an additional punishment. In addition, it is urged on his behalf that, having regard to his impeccable record, the anxiety, the publicity and the humiliation of criminal proceedings and the anxiety, publicity, humiliation and punishment in respect of the delay charge proceedings, he has been adequately punished for his transgressions arising out of Santhiran's criminal misappropriation and has paid his debt to society and the profession.

In our judgment, it would not be in the public interest or in the interest of the profession, on all the facts and the circumstances of the present case that no penalty is imposed. However, taking into consideration all the factors advanced on the respondent's behalf, we order that the respondent be suspended from practice for a period of two years and that he pay the costs of the present proceedings.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

CHIANG HONG PTE. LTD. v. LIM POH NEO t/a TAI SAN PLASTIC FACTORY

[C.A. (Wee Chong Jin C.J., Kulasekaram & Chua JJ.) March 6, 1984]
[Singapore – Civil Appeal No. 108 of 1981]

Landlord & Tenant – Claim for possession against respondent – Compensation Agreement between parties – Appellants agreed to pay $20,000/- for vacant possession – Destruction of premises by fire – Whether Compensation Agreement frustrated in law

Contract – Compensation Agreement between landlord and tenant – Destruction of premises by fire – Whether Compensation Agreement was frustrated in law.

The respondent was a tenant or licensee of a piece of land and a structure erected at No. 40-A Tannery Lane. The appellants subsequently became the owners of the said land (the premises). In 1977 the appellants commenced legal proceedings against the respondent to recover possession of the premises on the ground that the respondent was a mere licensee and alternatively on the ground that even if the respondent was a tenant, she was not entitled to the protection of the Control of Rent Act (Cap. 266). The respondent defended the action which was compromised after negotiations by an agreement dated September 13, 1979 (the Compensation Agreement).

Under the Compensation Agreement the respondent agreed to vacate and deliver up vacant possession of the premises to the appellants on or before June 30, 1980, in consideration of which the appellants agreed to pay $200,000/- less certain arrears of and future licence fees. Under clause 2 of the Compensation Agreement, the appellants agreed to pay a sum of $20,000/- to the respondent on signing of the agreement and the balance of the compensation on delivery of vacant possession of the said premises.

On January 5, 1980, before the respondent could leave the premises, a fire which started from a neighbouring site, completely destroyed the structure. Despite demands, the appellants refused to pay the balance. The respondent forfeited the sum of $20,000/- paid and claimed for the full sum of $167,142/- under the Compensation Agreement.

The appellants refused to pay on the ground that the Compensation Agreement was frustrated in law. The appellants appealed from an order of the High Court whereby judgment was given for the respondent against the appellants for the sum of $155,142/- with interest and costs and the appellants' claim against the respondent in Suit No. 541 of 1980 was dismissed.

Held, dismissing the appeal: (1) the destruction of the structure was not due to the fault of either party. The parties, when framing the Compensation Agreement, had not present in their minds the possibility of such a disaster and had made no express stipulation with reference to it;

(2) the learned trial judge rightly paid attention to the contents of the negotiations leading to the making of the Compensation Agreement;

(3) the doctrine of frustration does not apply in this case and the appeal should be dismissed.

Cases referred to:

(1) *Shore* v. *Wilson* 8 E.R. 450, 532.
(2) *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381.
(3) *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696.

COURT OF APPEAL.

Arthur Leolin Price, Q.C. (*Robert P.C. Tock* with him) for the appellants.

L.A.J. Smith for the respondent.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): This is an appeal from an order of the High Court whereby judgment was given for the respondent against the appellants for the sum of $155,142.00 with interest and costs and the appellants' claim against the respondent in Suit 541 of 1980 was dismissed.

The undisputed facts are these.

The respondent was trading as Tai San Plastic Factory which manufactured plastic sheets and bags. She was the sole proprietress. She was a tenant or licensee of an area of some 8,500 square feet of a larger piece of land of 35,572 square feet and a structure erected thereon and known as No. 40-A Tannery Lane. The appellants subsequently became the owners of the larger piece of land.

Both the structure and the land occupied by the respondent are hereinafter referred to collectively as "the Premises". The structure was erected during the Japanese occupation and the Premises was let to the respondent by the appellants' predecessors-in-title at a rent of $500.00 p.m. The structure was basically a wooden factory building with zinc roof.

In 1977 the appellants commenced legal proceedings against the respondent to recover possession of the Premises on the ground that the respondent was a mere licensee and alternatively on the ground that even if the respondent was a tenant, she was not entitled to the protection of the Control of Rent Act (Cap. 266). The respondent defended the action which was compromised after negotiations by an agreement dated September 13, 1979 ("the Compensation Agreement").

Under the Compensation Agreement the respondent agreed to vacate and deliver up vacant possession of the Premises to the appellants on or before June 30, in consideration of which the appellants agreed to pay her $200,000 less certain arrears of and future licence fees.

The material clauses in the Compensation Agreement are these:

"1. In consideration of a sum of $200,000/- (less the outstanding arrears of licence fee and future licence fees) as compensation to be paid by the Licensors to the Licensee, the Licensee hereby agree to deliver vacant possession of the Licensed Premises to the Licensors on or before the 30th of June 1980."

"2. On signing of the Agreement herein, the Licensors shall pay to the Licensee a sum of $20,000/- (receipt whereof the Licensee hereby acknowledges) and the balance of the compensation shall be paid on delivery of vacant possession of the Licensed Premises to the Licensors.

...

6. The Licensors shall cause the removal from the Licensed Premises of the structure only after payment in full.

7. For the purpose of better securing the payment of the balance of the compensation as herein agreed the Licensors agree with the Licensee that on the Licensee giving notice that she shall remove her property and deliver vacant possession of the Licensed Premises as herein agreed within a period of three (3) calendar months from the date of giving the notice the Licensors will forthwith place on fixed deposit in a reputable bank the balance of the compensation money payable under the Agreement calculated up to the date of the expiry of the notice in the joint names of L.A.J. SMITH, Solicitor for the Licensee and P.C. TOCK & Co., Solicitors for the Licensors such deposit to be for a period of three (3) months from the date of the receipt of the notice together with written irrevocable instructions to L.A.J. SMITH and P.C. TOCK & Co. to pay the said sum over to the Licensee on delivery of vacant possession either at the expiry of the said three (3) months or at any time prior thereto in the event that the Licensee delivers vacant possession before the expiration of the period of three (3) months herein referred to. The Licensors shall be solely entitled to any interest earned on the said sum but L.A.J. SMITH and P.C. TOCK & Co. shall be under no obligation to ensure that any interest is earned. In the event that the Licensee fails to deliver vacant possession and remove her property either at the expiration of the period of three (3) months or prior thereto the sum placed on fixed deposit shall be returned to the Licensors but otherwise WITHOUT PREJUDICE to the rights and obligations of the Licensee and Licensors under this Agreement which shall remain in full force and effect. In the event that the Licensors do not place the said sum as stipulated on fixed deposit as herein provided the Licensee shall be at liberty to forfeit the 10% already paid under this Agreement and the Agreement herein shall be treated as null void and of no effect. Save that the Licensee may elect to deliver up vacant possession in accordance with the terms of the Agreement whereupon the compensation money shall be payable by the Licensors and calculated according to the terms hereof with the exception that the $20,000/- already forfeited shall not be taken into account by the Licensors in calculating the payment to the Licensee."

On December 4, 1979, the respondent gave notice to the appellants under the Compensation Agreement that she would be delivering up vacant possession of the Premises at the end of March, 1980, or earlier in the month of March. The notice was to take effect from January 1, 1980. It was suggested that the balance of the compensation monies be placed in fixed deposit with a bank, as agreed, in the joint names of the solicitors of both parties.

On the following day the appellants fixed the balance payable as $147,142.00 and suggested that as the respondent's solicitor was going on leave the placement of the balance into a fixed deposit account should await the return of the respondent's solicitor on January 6, 1980. The respondent indicated her agreement on the amount payable and acceded to the request.

In the meantime, a fire, which started from a neighbouring site, completely destroyed the structure on January 5, 1980, before the respondent could leave the Premises. Despite demands, the appellants refused to place the balance payable into a fixed deposit and, accordingly, the respondent under Clause 7 of the Compensation Agreement forfeited the sum of $20,000.00 paid and in these proceedings claimed for the full sum of $167,142 under the clause.

The appellants refused to pay on the ground that the Compensation Agreement was frustrated in law and in fact commenced legal proceedings in Suit No. 541 of 1980 against the respondent claiming (a) a declaration that they are discharged from further or any performance under the Compensation Agreement; (b) the sum of $32,142.00 being arrears of licence fees for the period July 1, 1974 to January 5, 1980; (c) the sum of $20,000 being the sum paid to the respondent under the Compensation Agreement and (d) interest. That suit and the present proceedings were heard together.

The learned trial Judge held that it was "clear that the doctrine of frustration does not apply in this case and the (appellants') argument in this respect fails." It was also argued before the learned Judge that the Court should make an apportionment and deduct the value of the structure from the compensation monies payable. The structure was insured for $10,000.00 and that insurance was maintained up to the time of the fire. The toilet was put up by the respondent at the cost of some $3,700. The learned Judge concluded that the structure was worth $12,000.00 and deducting it from the respondent's claim of $167,142.00 the balance payable was $155,142.00 and he ordered that the appellants pay the respondent the sum of $155,142.00 together with interest thereon at 8% per annum from April 1, 1980, up to date of payment and costs. The appellants' claim in Suit No. 541 of 1980 was dismissed.

The destruction of the structure was not due to the fault of either party. The parties, when framing the Compensation Agreement, had not present in their minds the possibility of such a disaster and had made no express stipulation with reference to it. So the whole matter arises out of the Compensation Agreement and its effect. The question that arises is what are the consequences of the total destruction of the structure. The answer to the question must depend upon the general rules of law applicable to such a contract.

It is the appellants' contention that the fire of January 5, 1980, destroyed the subject matter of the Compensation Agreement. Further or alternatively it frustrated the commercial adventure. Thereafter it was impossible for the respondent to fulfil her part of the agreement so that both parties were discharged from all further obligations thereunder. Not only was the agreement frustrated but the respondent's complete inability to perform her obligations after the fire gave rise to a total failure of consideration on her part. In those circumstances the appellants ceased to be liable to make payment.

Counsel for the appellants submits that it was not open to the learned Judge to use certain letters forming part of the negotiations between the parties as an aid to construction of the Compensation Agreement and thus reach the conclusion that the appellants were "primarily, if not wholly, interested to recover vacant possession of the land."

The learned Judge in his Grounds of Decision said:

> "The Defendants wanted to recover vacant possession of the Premises so that they could re-develop their property. As the correspondence clearly showed, the Defendants were primarily, if not wholly, interested to recover vacant possession of the land. The structure was inconsequential and had to be demolished as soon as possible because it was "premises" within the protection of the Control of Rent Act. In the initial stage of the negotiations, the Defendants were quite content to leave it to the Plaintiff as the occupier to demolish the structure at the expense and cost

of the Plaintiff. Eventually, it was agreed that the Plaintiff would remove her machinery and installations inside the structure leaving the Defendants the task and costs of demolishing the structure.

This was the background in which the Compensation Agreement was signed. Although the recitals in the Compensation Agreement did refer to the structures and improvements which were included in the expression "the Licensed Premises", the subject matter for vacant possession, it is clear that getting the structure and improvements was a marginal matter. Vacant possession of the land was what the Defendants were aiming to get and that was what they had bargained to get."

In *Shore* v. *Wilson*[1] Lord Chief Justice Tindal said:

"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

In *Prenn* v. *Simmonds*[2] it was held that in construing a written agreement evidence of negotiations or of the parties' intentions ought not to be received by the Court and that evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction. Lord Wilberforce after discussing the reasons for not admitting evidence of negotiations or of the parties' intentions in construing a written agreement said:

"In my opinion, then, evidence of negotiations, or of the parties' intentions, and *a fortiori* of Dr. Simmonds' intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction."

In our view the learned Judge rightly paid attention to the contents of the negotiations leading to the making of the Compensation Agreement.

The appellants submit that the Compensation Agreement had been frustrated and consequently they are entitled to recovery of their $20,000 deposit in quasi-contract on the basis that it was payment for a consideration which has wholly failed.

What is the correct legal test for deciding whether a contract has been frustrated? The proper test for frustration is formulated in the House of Lords case of *Davis Contractors Ltd.* v. *Fareham U.D.C.*[3] The test put forward by Lord Reid and Lord Radcliffe (and Lord Somervell agreed with the conclusion of Lord Reid on "What is the proper basis of frustration") is summarised and commented on in paras. 1406 and 1407 of *Chitty* on Contracts, Vol. 1, 24th Ed.:

"1406 Construction of the contract. Both Lords Reid and Radcliffe emphasised that the first step was to construe "the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made." From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there has been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original "obligation" and what would be the new "obligation" if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a "radical" or "fundamental", change from the original obligation. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the "obligation" or the actual effect of the promises of the parties construed in the light of the new circumstances. Was "performance ... fundamentally different in a commercial sense"?

1407 Their Lordships also agreed that it is a matter of law for the court to construe the contract in the light of the facts existing at its formation and then "to determine whether the ultimate situation ... is or is not within the scope of the contract so construed." It is submitted that the House of Lords has accepted the view that the test for frustration is objective and that frustration is a matter of positive judicial intervention. It is not a subjective inquiry into the actual or presumed intentions of the parties, as was suggested by the older theory of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party. The fact that the parties, at the time of contracting,

actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying.
Cases since 1956 have endorsed and applied the test for frustration formulated in the *Davis Contractors* case."

We are of the view that the doctrine of frustration does not apply in this case.

In the result this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *P.C. Tock & Co.; L.A.J. Smith*

INTERSCHIFF SCHIFFAHRTSAGENTUR GmbH v. SOUTHERN STAR SHIPPING & TRADING PTE. LTD.

[O.C.J. (Lai Kew Chai J.) August 24, 1982]
[Singapore – Suit No. 3183 of 1978]

Shipping Law – Charterparty – Charterers' agents/plaintiffs as stakeholders – Bills of Lading to be released on deposit of US$100,000 to stakeholders – Defendants' irrevocable undertaking to plaintiffs to remit by TT US$100,000 amounted to contract – Alternatively, equitable assignment – Inference from telex messages.

Contract – Telex messages – Irrevocable undertaking by telex – Inference from telex messages – Equitable assignment.

Fraud – Fraudulent misrepresentation, allegation of – High degree of proof required.

The plaintiffs were ship-brokers and agents for the Charterers, Sea Transport Services Co. Under the terms of a time charterparty entered in mid-March 1978 between the Charterers and the Owners of the vessel, m.v. "Smirnachos Frangistar" the Charterers were required to deposit a sum of US$100,000/- with the plaintiffs, as stakeholders, to ensure due performance and observance of the Charterers' obligations. The deposit was to be made before the owners/master would release Bills of lading at Pusan, South Korea.

The vessel arrived at Pusan on March 24, 1978 and started loading on arrival when she was in the service of the Charterers. Loading was completed by March 31, 1978 and the shippers were awaiting the release of bills of lading to be signed by the owners' agents. The plaintiffs had not by this date received the deposit from the Charterers. At the Charterers' request, the plaintiffs agreed to extend credit of US$100,000/- to the Charterers on 2 conditions.

1. that the defendant company, the Singapore agents of the Charterers responsible for the encashment of freight from shippers would telex to the plaintiffs confirmation of their receipt of irrevocable instructions from the Charterers to teleremit US$100,000/- to the plaintiffs upon receipt of the freight.

2. the Charterers, themselves, would telex the plaintiffs that they have irrevocably instructed the defendants to remit the said sum to the plaintiffs out of freight received by them and earned by the Charterers as a result of the operations of the vessel.

The telex sent on Easter Friday 1978 by the Charterers to the defendants read as follows, "... Now Mr. Richter of Intershiff with whom I had long talk confirmed to me that he is agreeable to tell owners Frangistas OK we have received today the 100.00 dol. so no prob. provided you can send a telex to them telling that: vou are acting as our general agents in Far East that you are responsible for cashment of freight and that you have received irrevocable instructions from us that upon receipt freight you will TT immi 100.00 dollars to Interschiff and remit the balance to us ..."

The defendants' telex to the plaintiffs was as follows, "... we have received irrevocable instructions from sea transport antwerp that upon receipt frets of s frangistas will imdtly tt repeat tt usdllrs 100,000 to intershiff of hamburg and the balance frts will be remit under further instruction frm sea transport."

The Defendants failed to honour the commitment to the plaintiffs, and instead, remitted to the Charterers direct the sum of US$228,000/- on April 13, 1978 and a further sum of US$85,049.25 on April 24, 1978.

The Charterers became insolvent and failed to pay the plaintiffs. The plaintiffs honoured their commitment to the owners and paid them US$100,000/- on August 14, 1978. The plaintiffs commenced the action against the Defendants to recover the said sum.

Held; (1) there was a contract between the plaintiffs and the Defendants as evidenced by the defendants' telex to the plaintiffs dated March 31, 1978. The consideration therefor was the defendants' request to the plaintiffs to cause the release of the bills of lading;

(2) in the alternative, even if there was no contract between the plaintiffs and the defendants, the two telexes both dated March 31, 1978, one from the Charterers to the defendants and the other from the defendants to the plaintiffs, constituted a good equitable assignment of the debt due from the Defendants to the Charterers.

(3) a high degree of proof is required to make good any allegation of fraud and misrepresentation. The plaintiffs' confirmation to the owners that they were holding US$100,000/- at the owners' disposal was not a fraudulent misrepresentation.

Case referred to:

(1) *William Brandt's Sons & Co.* v. *The Dunlop Rubber Co* [1905] A.C. 454; [1904-7] All E.R Rep. 345, 21 T.L.R. 710.

CIVIL SUIT.

G. Pannirselvam (*Peter Loh* with him) for the plaintiffs.

H.E. Cashin (*Jeffrey Beh* with him) for the defendants.